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No. 83-529

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether law enforcement officers may temporarily detain an individual reasonably suspected of criminal activity for the period—brief, but exceeding a few minutes—reasonably necessary to pursue a circumscribed investigation of the suspected criminal activity.

2. Whether, assuming that respondents were unlawfully detained in violation of the Fourth Amendment, the illegality mandates suppression as to respondent Sharpe of a large shipment of marijuana discovered in respondent Savage's pickup truck.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provision involved	2
Statement	2
Introduction and summary of argument	12
Argument:	
I. The detention of respondents was reasonable under the Fourth Amendment	15
A. In determining whether a seizure less intrusive than a traditional arrest is permissible under the Fourth Amendment, it is necessary to consider the reasonableness of the seizure in light of all the surrounding circumstances	16
B. Examination of the surrounding circumstances compels the conclusion that respondents were reasonably detained	25
II. The marijuana seized from the pickup truck is not a suppressible fruit of any illegality to which respondent Sharpe may object	33
Conclusion	36

TABLE OF AUTHORITIES

Cases:

Adams v. *Williams*, 407 U.S. 143	13, 16, 18, 19, 23
Berkemer v. *McCarty*, No. 83-710 (July 2, 1984)	15
Brown v. *Texas*, 443 U.S. 47	18
Delaware v. *Prouse*, 440 U.S. 648	15
Dunaway v. *New York*, 442 U.S. 200	8, 14, 17, 18, 19, 30, 31
Florida v. *Royer*, No. 80-2146 (Mar. 23, 1983)	14, 16, 17, 24, 27, 29, 30, 31
Illinois v. *Gates*, No. 81-430 (June 8, 1983)	33

Cases—Continued: Page

Michigan v. *Summers*, 452 U.S. 692 ..... *passim*
Nix v. *Williams*, No. 82-1651 (June 11, 1984) 34
Robbins v. *California* 453 U.S. 420 9
Scott v. *United States*, 436 U.S. 128 26
Segura v. *United States*, No. 82-5298 (July 5, 1984) 33-34
Terry v. *Ohio*, 392 U.S. 1 ..... *passim*
United States v. *Brignoni-Ponce*, 422 U.S. 873 ..... 8, 13, 17, 18, 19, 23, 30
United States v. *Chamberlin*, 644 F.2d 1262, cert. denied, 453 U.S. 914 32
United States v. *Contreras-Diaz*, 575 F.2d 740, cert. denied, 439 U.S. 855 23
United States v. *Crews*, 445 U.S. 463 ..... 34, 36
United States v. *Leon*, No. 82-1771 (July 5, 1984) .. 33
United States v. *Mayes*, 524 F.2d 803 23
United States v. *Mendenhall*, 446 U.S. 544 ..... 25, 29
United States v. *Miller*, 546 F.2d 251 32
United States v. *Moore*, 638 F.2d 1171, cert. denied, 449 U.S. 1113 23
United States v. *Ogden*, 703 F.2d 629 23
United States v. *O'Looney*, 544 F.2d 385, cert. denied, 429 U.S. 1023 22
United States v. *Perez-Esparza*, 609 F.2d 1284 32
United States v. *Place*, No. 81-1617 (June 20, 1983) ..... *passim*
United States v. *Richards*, 500 F.2d 1025, cert. denied, 420 U.S. 924 23
United States v. *Ross*, 456 U.S. 798 ..... 10, 11
United States v. *Scott*, 545 F.2d 38, cert. denied, 429 U.S. 1066 29
United States v. *Sharpe*, 457 U.S. 1127 10
United States v. *Short*, 570 F.2d 1051 22
United States v. *Stevie*, 578 F.2d 204, rev'd on other grounds, 582 F.2d 1175, cert. denied, 443 U.S. 911 29
United States v. *Streifel*, 665 F.2d 414 23
United States v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983) 3
United States v. *Wylie*, 569 F.2d 62, cert. denied, 435 U.S. 944 22
Wong Sun v. *United States*, 371 U.S. 471 ..... 14, 34, 35

Constitution and statute: Page

U.S. Const. Amend. IV ..... *passim*
21 U.S.C. 841(a)(1) 2

Miscellaneous:

3 W. LaFave, *Search and Seizure* (1978) 20

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OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1a-13a) is reported at 712 F.2d 65. The initial opinion of the court of appeals (Pet. App. 14a-51a) is reported at 660 F.2d 967. The district court's oral rulings on respondents' suppression motions (J.A. 43-45) are not reported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 52a, 53a) were entered on June 30, 1983. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 28, 1983. The petition was filed on Septem-

ber 27, 1983, and was granted on June 18, 1984 (J.A. 46). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Following a bench trial in the United States District Court for the District of South Carolina, respondents were convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 842(a)(1). Respondent Savage was sentenced to eight years' imprisonment, to be followed by a ten-year special parole term. Respondent Sharpe was sentenced to five years' imprisonment, to be followed by a ten-year special parole term. A divided panel of the court of appeals reversed respondents' convictions. On our petition for a writ of certiorari (No. 81-1736), the judgment of the court of appeals was vacated and the case was remanded for further consideration. 457 U.S. 1127. On remand the court of appeals, again divided, modified its opinion but once again reversed respondents' convictions.[1]

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[1] We understand that respondent Sharpe has become a fugitive; this fact, however, does not affect the Court's jurisdiction over Sharpe's case. The government has sought review of the court of appeals' decision reversing respondents'

1. Prior to trial, respondents moved to suppress a large shipment of marijuana found in bales seized from a pickup truck that had been operated by respondent Savage (J.A. 5-8). The evidence showed that on the morning of June 9, 1978, DEA Agent Luther Cooke, who had had considerable experience in drug enforcement matters,[2] was on patrol in an unmarked car on a coastal road in the vicinity of Sunset Beach, North Carolina, an area under surveillance by law enforcement authorities for suspected drug trafficking (J.A. 9-10). At approximately 6:30 a.m., Agent Cooke noticed a blue pickup truck outfitted with a camper shell travelling in tandem with a blue Pontiac. It was later ascertained that the pickup truck was operated by respondent Savage and that the Pontiac (which also contained a male passenger) was operated by respondent Sharpe. Agent Cooke knew from experience that pickup trucks with camper tops are often used to transport marijuana after it has been unloaded from boats. The agent noticed that the pickup truck driven by Savage was riding low in the rear and appeared overloaded; in addition, the rear window of the camper appeared to be covered from the inside with a quilted material. J.A. 9-10, 11-12.

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convictions. Reversal of that decision would reinstate the judgments of conviction and sentences entered by the district court and would subject respondent Sharpe to arrest and imprisonment on his conviction. See *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 1-3 n.2.

[2] Agent Cooke had worked as a narcotics agent since 1966 and had investigated more than 700 drug cases, including major marijuana smuggling cases, in the course of his career (J.A. 9).

As he followed the pickup, Agent Cooke also observed that when the truck hit a bump or turned a corner it did not bounce or sway, a further indication that it was carrying a heavy load. Cooke drove along behind the two vehicles for approximately 21 miles. When the respondents reached the vicinity of Myrtle Beach, South Carolina, the agent pulled up alongside the pickup truck and noticed that the side windows of the camper top were also covered with a quilted material, hung in a horizontal position,[3] and that the vehicle appeared to be heavily loaded in the rear. Agent Cooke radioed the State Highway Patrol for assistance. J.A. 13-15.

Officer Kenneth Thrasher, in a marked patrol car, answered Cooke's request for assistance. After Thrasher caught up with Cooke, the two officers, in their separate vehicles, followed respondents as the Pontiac and pickup truck turned onto a side road that ran through a campground and looped back to the highway. Although the speed limit on the road was 35 miles per hour, respondents drove their vehicles at 50 to 60 miles per hour in an apparent attempt to elude the officers. J.A. 14, 15-17, 34-36; Pet. App. 15a-16a. After completing this fruitless detour the Pontiac and the pickup truck returned to the six-lane highway and continued to proceed in a southerly direction in the center lane. While the officers maintained their pursuit, Agent Cooke asked Officer Thrasher to signal both vehicles to stop. Thrasher pulled into the left lane alongside the Pontiac, the lead vehicle, and signaled the driver, re-

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[3] Cooke testified that, unlike campers used for camping purposes, in which matching curtains are usually hung, campers used to transport marijuana often have window coverings that are mismatched or hung sideways (J.A. 15).

spondent Sharpe, to pull over. As Sharpe moved his car into the right lane in compliance with this direction, the pickup truck, driven by respondent Savage, cut between the Pontiac and Thrasher's patrol car, nearly hitting the patrol car, and continued down the highway. J.A. 16-17, 36-37.

While Officer Thrasher pursued the pickup, DEA Agent Cooke pulled up behind the Pontiac (which had come to a stop), approached its occupants, and requested identification from respondent Sharpe and his companion. Sharpe produced a Georgia driver's license bearing the name Raymond J. Pavlovich. J.A. 17-18. Cooke then attempted for several minutes to radio Thrasher to determine whether he had succeeded in stopping the pickup, but he was unable to make contact, apparently because Thrasher was not in his patrol car. Approximately 10 to 15 minutes after the initial stop of the Pontiac, two local Myrtle Beach policemen arrived at the location of that stop to remain with Sharpe and his companion while Cooke left to locate Officer Thrasher and the pickup. J.A. 18-19, 28-29.

Meanwhile, Officer Thrasher had succeeded in stopping respondent Savage's pickup truck approximately a half-mile down the highway. As Thrasher got out of his patrol car with his revolver drawn, Savage stepped out of the truck. After searching Savage, Thrasher holstered his weapon and asked Savage to produce his driver's license and vehicle registration. Savage produced a Florida driver's license in his own name and a bill of sale in the name of Pavlovich. Noting that the truck bore South Carolina license plates, that the bill of sale bore a Georgia address and that Savage's license was from Florida, Thrasher questioned Savage about the ownership of the truck.

In response to the officer's questions, Savage stated that the vehicle belonged to a friend, that it was empty, and that he was taking it to get the shock absorbers fixed. He also denied speeding on the campground road and stated that Thrasher was not behind him when he drove through the area. When Thrasher told Savage that Cooke was a DEA agent and would be arriving shortly, Savage became nervous, requested that Thrasher return his driver's license, and asked permission to leave. Thrasher responded that Savage was not free to leave, that he would be detained until Cooke's arrival, and that he could be held on speeding charges if necessary. J.A. 37-39, 41-43.

When Agent Cooke arrived, approximately 20 minutes after the truck had been stopped, he identified himself, examined the bill of sale that Savage had produced, and observed that the name on it matched the name on the driver's license that Sharpe had produced. Cooke told Savage that he suspected that the pickup contained marijuana. He requested permission to search the truck, but Savage declined, explaining that he was not the owner of the vehicle. J.A. 20, 29-30. Cooke then stepped onto the rear bumper and, noting that the truck did not move in response, confirmed his suspicion that the truck was heavily loaded. Cooke then leaned against the rear window of the camper top, took a deep breath, and "smelled a very strong and distinct odor of marijuana." J.A. 20-21, 40. Using keys that he removed from the vehicle's ignition, Agent Cooke opened the rear door of the camper and found inside a large number of burlap-wrapped bags, which he described as "similar to the large number of bales of marijuana [he had] encountered over the * * * years"

that he had been employed as a DEA agent. J.A. 21, 40.

Cooke then placed Savage under arrest and left him in Officer Thrasher's custody while he returned to the Pontiac to arrest Sharpe and his companion (J.A. 21, 41).[4] In all, 30 to 40 minutes elapsed between the initial stop of the Pontiac and the arrests of Savage and Sharpe following the discovery of the marijuana bales in the pickup (J.A. 33; Pet. App. 17a).

Later that day, the pickup truck was taken to the Federal Building in Charleston, South Carolina. Two or three days later, DEA agents removed from the truck 43 bales weighing a total of 2,600 pounds. Acting without a search warrant, the agents selected eight bales at random, punctured their coverings, and withdrew core samples for laboratory analysis. J.A. 21-23. The analysis confirmed that the substance was marijuana.

On the basis of this evidence, the district court denied respondents' motions to suppress the marijuana, Sharpe's pseudonymous driver's license and the bill of sale for the pickup truck. J.A. 43-45.

2. A divided court of appeals reversed respondents' convictions (Pet. App. 14a-51a). The majority assumed that Agent Cooke "had an articulable and reasonable suspicion that [respondents] were engaged in marijuana trafficking when he and Thrasher stopped the Pontiac and the truck" (*id.* at 19a).

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[4] The charges against Sharpe's companion were ultimately dismissed (Pet. App. 16a). After Cooke left the location at which the pickup truck had been stopped, Savage attempted to bribe Thrasher, stating that if Thrasher would remove Savage's handcuffs and permit him to escape, "the owner of the truck would send [Thrasher] thirty thousand dollars" (J.A. 41).

But the court held the investigative stops of respondents unlawful because they "failed to meet the requirement of brevity" (*ibid.*) thought to govern such detentions on less than probable cause, which the court inferred from this Court's decisions in *Dunaway* v. *New York*, 442 U.S. 200 (1979), *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), and *Terry* v. *Ohio*, 392 U.S. 1 (1968). The court of appeals relied particularly (Pet. App. 19a-20a) upon language in *Brignoni-Ponce* describing a *typical* border patrol investigatory stop (stated to be permissible if based on reasonable suspicion) as " 'usually consum[ing] no more than a minute' " (422 U.S. at 880, quoting Brief for the United States at 25). The majority considered only the duration of the respondents' detentions in holding that the encounters had exceeded the scope of investigation permissible on the basis of reasonable suspicion short of probable cause. Noting that "Sharpe was detained * * * for thirty to forty minutes before Cooke returned to the Pontiac to arrest him, and [that] Savage was held * * * by Thrasher for at least fifteen minutes before being questioned and finally arrested by Cooke," the majority concluded that "the length of the detentions effectively transformed them into de facto arrests without bases in probable cause" and that the detentions therefore constituted unlawful seizures under the Fourth Amendment (Pet. App. 20a).

The court of appeals concluded that the shipment of marijuana discovered in the pickup truck should have been suppressed as the fruit of the unlawful detention of respondents (Pet. App. 21a-22a).[5] The

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[5] The court of appeals deemed it unnecessary to decide whether Sharpe's driver's license and the bill of sale covering the truck should have been suppressed (Pet. App. 22a n.2).

court reasoned that, but for the extended detention of Savage, "Cooke obviously would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck" (*id.* at 22a). The fact that the odor of marijuana was apparent to Agent Cooke as soon as he approached the truck was deemed irrelevant because "Cooke's smelling the marijuana was so intertwined with the circumstances of the unlawful detentions" (*ibid.*).

As an alternative basis for mandating suppression of the marijuana, the court of appeals held that the DEA agents' warrantless search of the burlap-wrapped marijuana bales discovered in the pickup truck violated the Fourth Amendment (Pet. App. 23a-25a). The court concluded that, under either the analysis adopted by the plurality opinion in *Robbins* v. *California*, 453 U.S. 420 (1981), or the expectation-of-privacy analysis employed in Justice Powell's concurring opinion in that case (*id.* at 429-430), the warrantless search of the bales was impermissible.

Judge Russell dissented (Pet. App. 26a-51a). He disagreed with the majority's holding that an investigative detention on less than probable cause is invariably unlawful if more than momentary. Instead, he expressed the view that, in determining whether the length of a detention renders a particular stop unreasonable, the courts must look to the totality of the circumstances justifying the detention (*id.* at 29a). Judge Russell observed that any delay that prolonged respondents' detention in this case was not attributable to the law enforcement officers, but was occasioned by respondent Savage's efforts to avoid being stopped together with respondent Sharpe. Because it was reasonable to detain both respondents for questioning by DEA Agent Cooke concerning

their suspected joint drug trafficking activities, Judge Russell concluded that the detention of respondents did not violate the Fourth Amendment (*id.* at 29a-38a).

Judge Russell also rejected the majority's alternative holding disapproving the warrantless search of the marijuana bales (Pet. App. 39a-51a). He reasoned that the distinctive odor emanating from the 2,600 pounds of marijuana effectively "place[d] the contents of the bales in 'plain view'" (*id.* at 44a-45a) and accordingly rendered their warrantless search permissible.

3. After rehearing en banc was denied by an equally divided court, the United States sought review in this Court. In our petition for a writ of certiorari (No. 81-1736), we presented three questions for review: (1) whether the investigative detention of respondents was unlawfully prolonged; (2) whether the marijuana found in the pickup truck was correctly found to be a fruit of any unlawful detention; and (3) whether the warrantless search of the bales was itself unlawful. This Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of the intervening decision in *United States* v. *Ross*, 456 U.S. 798 (1982). *United States* v. *Sharpe*, 457 U.S. 1127 (1982).[6]

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[6] Justice Stevens, joined by Justices Brennan and Marshall, dissented from this disposition, stating (457 U.S. at 1128) that in *Ross* the Court had held

> that the scope of a legitimate warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found. The issue presented in this case is whether

4. On remand, a divided court of appeals again reversed respondents' convictions (Pet. App. 1a-13a). The majority concluded that, in light of *Ross*, it was required to "disavow" (Pet. App. 2a) its alternative holding disapproving the warrantless search of the marijuana bales. But, "[f]inding that *Ross* does not adversely affect our primary holding that the initial stop of the vehicle and the lengthy detention of the two defendants constituted illegal seizures," the court readopted the prior opinion as modified, reaffirmed its previous decision, and reversed the convictions (*id.* at 2a-3a).

Judge Russell again dissented. In his view, this Court's remand required the court of appeals to reconsider its conclusion that the detention of respondents was unlawfully prolonged (Pet. App. 5a-7a).[7] Addressing that issue, he urged that the majority's adherence to its prior decision was inconsistent with *Michigan* v. *Summers*, 452 U.S. 692 (1981), and improperly failed to take into account the fact that respondents were themselves responsible for the circumstances that prolonged their detention (Pet. App. 8a-9a).[8]

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a warrantless search [of a vehicle] was itself legitimate. Since our opinion in *United States* v. *Ross* sheds no light on the proper disposition of the case, I respectfully dissent.

[7] The majority declined the urging of the dissent to reconsider its "principal holding or to reargue the same issues that were addressed in detail in the original majority and dissenting opinions," reasoning that its action complied with this Court's mandate (Pet. App. 2a n.1).

[8] Prior to entry of the court of appeals' judgments on remand, the opinions were circulated to the full court. A suggestion for en banc reconsideration was made by a member

INTRODUCTION AND SUMMARY OF ARGUMENT

I

The principal question presented by this case concerns the permissibility under the Fourth Amendment of detaining a suspect for a limited, but more than momentary, period on the basis of reasonable suspicion falling short of probable cause, for the purpose of pursuing a circumscribed investigation of the suspected criminal activity. This question is of great practical importance to law enforcement authorities. There are a wide variety of situations in which it may be advisable, in the course of a routine investigatory stop, for an officer to detain a suspect beyond the minute or two that, in the view of the court of appeals, define the outer boundaries of a permissible seizure on less than probable cause. For example, a suspect may be detained while the police attempt to determine whether a crime has occurred in the area or, if a crime is known to have occurred, to enable witnesses to the crime to view the suspect. See *Michigan* v. *Summers*, 452 U.S. 692, 700-701 n.12 (1981). Unless overturned, the holding of the court of appeals that investigatory stops that are more than momentary are per se unreasonable under the Fourth Amendment in the absence of probable cause, without regard to the facts or circumstances that affect the duration of the detention, would seriously impede legitimate law enforcement activities.

In support of its holding, the court of appeals relied on inferences drawn from the facts underlying

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of the court but failed to garner the necessary majority vote. Nevertheless, the opinions on remand reflect that the full court was divided five to four in favor of the decision of the panel majority (Pet. App. 3a, 4a, 13a).

this Court's decisions in *Terry* v. *Ohio*, 392 U.S. 1 (1968), *Adams* v. *Williams*, 407 U.S. 143 (1972), and *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). It is true that the stops involved in those cases were all quite brief. But, contrary to the decision below, it does not necessarily follow that any but the briefest detention must be treated as the equivalent of an arrest requiring probable cause.

Indeed, the court of appeals' approach is contrary to the fundamental standard of reasonableness embodied in the Fourth Amendment. As this Court's decision in *Summers* makes clear, "[i]f the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*" (452 U.S. at 700 n.12). See also *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 12 (noting that the Court has recognized "the reasonableness of seizures longer than the momentary ones involved in *Terry*, *Adams*, and *Brignoni-Ponce*").

The court of appeals therefore erred in refusing to consider the circumstances surrounding the officers' actions, which compel the conclusion that the detention of respondents was reasonable. To begin with, the stop of respondents was justified at its inception by a reasonable suspicion that they were engaged in drug trafficking. Moreover, the extended nature of respondents' detention "was reasonably related in scope to the circumstances which justified the interference in the first place" (*Terry* v. *Ohio*, 392 U.S. at 20). During the period that respondents were detained, DEA Agent Cooke diligently pursued his in-

vestigation into their suspicious activities. In assessing the reasonableness of the detention, it is highly significant that the delay encountered by Cooke in pursuing the investigation, which extended the period of detention, was not the fault of the law enforcement officers but was attributable to respondent Savage's evasive action that resulted in respondents' being stopped at separate locations by different officers. This case is therefore distinguishable from *Dunaway* v. *New York*, 442 U.S. 200 (1979), and *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), where the intrusive nature of the detentions more closely approximated aspects of a formal arrest and was due to the deliberate actions of the officers.

II

Even if the seizure of respondents was unreasonable under the Fourth Amendment, the marijuana seized from the pickup truck is not a suppressible fruit of any illegality to which respondent Sharpe was subjected. Assuming that Sharpe had a legitimate privacy interest in the contents of the truck, that interest was not infringed by Agent Cooke's detection of the odor of marijuana emanating from the rear of the pickup. See *United States* v. *Place*, slip op. 10-11. At most, the discovery of the marijuana was the fruit of the seizure of Savage and his truck; it was not the result of any impropriety connected with Sharpe's detention. In short, the discovery of the marijuana following Savage's detention "invaded no right of privacy of person or premises which would entitle [Sharpe] to object to its use at his trial." *Wong Sun* v. *United States*, 371 U.S. 471, 492 (1963).

ARGUMENT

I. THE DETENTION OF RESPONDENTS WAS REASONABLE UNDER THE FOURTH AMENDMENT

The Fourth Amendment protects the "right of the people to be secure in their persons * * * against unreasonable searches and seizures." There is no question that respondents were "seized" within the meaning of the Fourth Amendment when Agent Cooke and Officer Thrasher stopped respondents' vehicles and detained respondents for the purpose of inquiring into their suspicious conduct. See *Berkemer* v. *McCarty*, No. 83-710 (July 2, 1984), slip op. 15; *Delaware* v. *Prouse*, 440 U.S. 648, 653 (1979). The court of appeals assumed (Pet. App. 19a), quite properly in our view, that the initial stop of respondents was justified by a reasonable suspicion that they were engaged in marijuana trafficking. It is also clear that respondents were not formally arrested until after Agent Cooke discovered the marijuana inside the pickup truck driven by Savage. We concede, for purposes of this case, that probable cause to arrest respondents for drug offenses did not arise prior to Cooke's discovery of the marijuana. Thus, the question posed is whether the police may, on the basis of reasonable suspicion not amounting to probable cause, detain a person for a limited but more than momentary period where necessary to advance their investigation.

Although it assumed that the initial seizure of respondents was lawful, the court of appeals held that the permissible seizure became unlawful by virtue of its extended duration. In reaching this result, the court focused solely on the length of time respondents were detained, without regard to the circumstances that necessitated the extended nature of the detention. By adopting a per se rule of "brevity"

while eschewing an examination of the reasonableness of the officers' actions in light of all the circumstances, the court of appeals seriously departed from the central teaching of the Fourth Amendment.

A. In Determining Whether A Seizure Less Intrusive Than A Traditional Arrest Is Permissible Under The Fourth Amendment, It Is Necessary To Consider The Reasonableness Of The Seizure In Light Of All The Surrounding Circumstances

1. In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court first "recognized the narrow authority of police officers who suspect criminal activity to make limited intrusions on an individual's personal security based on less than probable cause." *Michigan* v. *Summers*, 452 U.S. 692, 698 (1981). See *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 5-6; *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 6 (plurality opinion). In upholding a frisk of an individual reasonably believed to be armed and dangerous, the Court implicitly acknowledged that the Fourth Amendment permits forcible stops when the officer has a reasonable suspicion that a crime has been or is being committed. See *Terry* v. *Ohio*, 392 U.S. at 32-33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring). The Court explicitly adopted that rule and explained its rationale in *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972):

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. * * * A brief stop of a suspicious individual, in order to determine his identity or

> to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Thereafter, in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-882 (1975), the Court applied these principles in holding that a reasonable suspicion of criminal activity warrants a brief stop of an automobile for the purpose of investigating the circumstances arousing suspicion. "These cases recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained and are justified by such substantial law enforcement interests that they may be made on less than probable cause, so long as police have an articulable basis for suspecting criminal activity." *Michigan* v. *Summers*, 452 U.S. at 699.

At the same time, however, the Court has emphasized that *Terry* and its progeny created only limited exceptions to the general rule that an official seizure of the person must be supported by probable cause. See *Michigan* v. *Summers*, 452 U.S. at 696; *Florida* v. *Royer*, slip op. 7 (plurality opinion). The classic example of a seizure requiring probable cause is a traditional arrest but, as the Court made clear in *Dunaway* v. *New York*, 442 U.S. 200 (1979), the formal label attached by the police is not the dispositive factor. Rather, probable cause is required whenever a suspect's freedom of movement is restrained by means that resemble the conditions of a traditional arrest.[9]

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[9] In *Dunaway*, the detention lasted approximately one hour, involved transportation of the suspect to the police station without his consent, and was undertaken for the purpose of

The brief stops involved in *Terry*, *Adams*, and *Brignoni-Ponce*, and the more severe detention involved in *Dunaway* stand arrayed along a spectrum defining the range of Fourth Amendment seizures. Between these two points of demarcation are detentions that are more than momentary and yet not so intrusive as to have the essential attributes of a formal arrest. The lawfulness of such detentions

> rests on a balancing of the competing interests to determine the reasonableness of the type of seizure involved within the meaning of "the Fourth Amendment's general proscription against unreasonable searches and seizures." * * * We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause.

United States v. *Place*, slip op. 6-7 (quoting from *Terry* v. *Ohio*, 392 U.S. at 20). See also, *e.g.*, *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979).

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custodial interrogation of apparently unlimited duration, culminating in a formal arrest when Dunaway confessed.

The rule requiring probable cause for arrests and their equivalents is the result of applying the Fourth Amendment's reasonableness standard. As the Court stated in *Dunaway* (442 U.S. at 208): "The standard of probable cause * * * represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment." See *Michigan* v. *Summers*, 452 U.S. at 699-700.

The court of appeals apparently believed that this general reasonableness analysis may be applied only to the limited class of cases involving a momentary detention of a suspect, as in *Terry*, *Adams*, and *Brignoni-Ponce* (see Pet. App. 19a-20a). Under this view, any seizure that lasts more than a minute or two must be justified by probable cause and, in the absence thereof, is unlawful regardless of its apparent reasonableness (or, put another way, is presumptively unreasonable). As this Court's recent decisions demonstrate, however, the court of appeals' approach is inconsistent with "the ultimate standard of reasonableness embodied in the Fourth Amendment." *Michigan* v. *Summers*, 452 U.S. at 699-700 (footnote omitted).

2. In *Michigan* v. *Summers*, *supra*, this Court held that it was lawful for the police to detain the occupants of a house on less than probable cause while executing a warrant authorizing a search of the premises for contraband. In reaching this result, the Court emphasized (452 U.S. at 700; footnote omitted) that

> the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* and *Adams*.

The Court noted in this regard that *Terry* is not "'an almost unique exception to a hard-and-fast standard of probable cause.' Rather, 'the key principle of the Fourth Amendment is reasonableness—the balancing of competing interests.'" *Summers*, 452 U.S. at 700 n.12 (quoting from *Dunaway*, 442 U.S. at 219 (White, J., concurring)). The Court in *Summers* then explained (452 U.S. at 700 n.12) that

> [i]f the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*.

The Court also quoted with approval Professor LaFave's comments on the permissible scope of investigative detention based on reasonable suspicion:

> "It is clear that there are several investigative techniques which may be utilized effectively in the course of a *Terry*-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained. Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted. Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale."

Summers, 452 U.S. at 700-701 n.12 (quoting 3 W. LaFave, *Search and Seizure* § 9.2, at 36-37 (1978)).

Professor LaFave's summary of the governing principles concludes that the permissibility of extending a *Terry* stop should turn on "whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon and whether it is rather essential to the investigation that the suspect's presence be continued during that interval." *Id.* at 40 (quoted in *Summers*, 452 U.S. at 701-702 n.14).

Thus, while *Summers* itself involved the detention of a suspect in the course of conducting a warrant-authorized search of his premises, the Court's analysis clearly demonstrates that a law enforcement officer making a valid *Terry* stop may also lawfully detain the suspect for more than a brief moment if such action is reasonably required in order to pursue a legitimate avenue of investigation.[10]

The Court recently reaffirmed these principles in *United States* v. *Place*, *supra*. Although the Court there held that "on the facts presented" (slip op. 13) the 90-minute investigative detention was unduly prolonged, it once again acknowledged "the reasonableness of seizures longer than the momentary ones involved in *Terry*, *Adams*, and *Brignoni-Ponce*" (slip op. 12). To be sure, the Court recognized (as do we) that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion"

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[10] Indeed, the Court noted in *Summers* that the mere fact that its holding arose in the context of "a case in which the police had a warrant [did] not * * * preclude the possibility that comparable police conduct may be justified by exigent circumstances in the absence of a warrant" (452 U.S. at 702 n.17).

(slip op. 12-13). But the Court pointedly "decline[d] to adopt any outside time limitation for a permissible *Terry* stop" (slip op. 13; footnote omitted), explaining that adoption of a "rigid time limitation," such as the 20 minute period allowed by the American Law Institute's Model Code of Pre-Arraignment Procedure, would be unwise because it "would undermine the * * * important need to allow authorities to graduate their responses to the demands of any particular situation" (slip op. 13 n.10). Moreover, the Court emphasized that the reasonableness of a given period of detention cannot be assessed without regard to the diligence—or lack thereof—of police in pursuing their investigation by reasonably available means (slip op. 13).

The courts of appeals have also upheld the detention of a suspect beyond a momentary stop in a number of different settings, where the justification for extending the detention outweighed the intrusion on the suspect's privacy. For example, in *United States* v. *Short*, 570 F.2d 1051, 1054-1055 (D.C. Cir. 1978), the court held that it was permissible for the police to detain a burglary suspect, whom they lacked probable cause to arrest, for the purpose of transporting the suspect to the scene of the burglary for possible identification by the victim. Accord, *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978). And in *United States* v. *O'Looney*, 544 F.2d 385, 389 (9th Cir.), cert. denied, 429 U.S. 1023 (1976), the court concluded that the Fourth Amendment permitted the police to detain a person suspected of smuggling firearms for the period necessary to obtain the presence of a law enforcement officer with specific expertise in conducting investigations of such offenses. Accord, *United*

States v. *Moore*, 638 F.2d 1171, 1174 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981) (approving investigative detentions necessary to obtain presence of police officers with special expertise; collecting cases).[11]

The decision below is plainly at odds with the decisions of this Court concerning the permissible duration of detentions that may be justified on less than probable cause. In light of the Court's unequivocal statements in *Summers* and *Place* that *Terry*, *Adams*, and *Brignoni-Ponce* do not mark the outer perimeter of permissible investigation, the court of appeals' reliance upon those very cases to establish a rigid limit of a few minutes upon the duration of such detentions was clearly unwarranted. Moreover, the deci-

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[11] See also *United States* v. *Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975) (approving detention of two persons suspected of drug smuggling for more than an hour while DEA agents checked with the Federal Aviation Administration to determine whether the aircraft in which the suspects were about to depart was stolen); *United States* v. *Mayes*, 524 F.2d 803, 805-808 (9th Cir. 1975) (upholding detention of suspected drug smuggler for an hour and a half while Border Patrol agents attempted to verify or disprove suspect's exculpatory explanation concerning his activities); *United States* v. *Contreras-Diaz*, 575 F.2d 740, 745 (9th Cir.), cert. denied, 439 U.S. 855 (1978) (inability of suspected illegal aliens to furnish valid identification justified their prolonged detention to permit a check with the Border Patrol); *United States* v. *Streifel*, 665 F.2d 414 (2d Cir. 1981) (upholding stop and boarding of vessel where 48 minutes elapsed between initial order to stop and acquisition of probable cause to arrest); *United States* v. *Ogden*, 703 F.2d 629, 633-634 (1st Cir. 1983) (stop of four tractor-trailers and detention of ten individuals for a half hour held justified where officers reasonably suspected that the trucks were being used in a drug smuggling scheme).

sion of the court of appeals ignores the everyday realities of police-citizen encounters. As the Court in *Summers* recognized (see page 20, *supra*), there are numerous situations in which an officer's suspicions may not be resolved but may be further aroused as a result of questioning a suspect during a *Terry* stop. If any further detention of the suspect for investigation were prohibited in the absence of probable cause, no matter how limited the intrusion on personal freedom and regardless of the reasonableness of the detention, legitimate law enforcement efforts would be seriously hampered.

3. The court of appeals thus erred in refusing to consider the law enforcement purposes to be served by the detention, the time needed reasonably to effectuate those purposes, or the circumstances of this case that prolonged respondents' detention. Consideration of these factors is the very essence of the Fourth Amendment's reasonableness requirement. Since *Terry*, the Court has invariably assessed the reasonableness of Fourth Amendment seizures by inquiring "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place" (392 U.S. at 19-20). This inquiry necessarily entails a weighing of all of the pertinent facts and circumstances in each case. As the plurality in *Royer* explained (slip op. 8-9):

> The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an

investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.

In sum, proper Fourth Amendment analysis requires the courts to measure the lawfulness of an extended *Terry* stop by the substantiality and rationality of the officers' justification for undertaking it. The inquiry should focus on the purpose of extending the detention—*i.e.*, the specific course of action that the police pursued during the period, and whether these actions were likely to produce confirmation of their suspicions within a relatively short period. The court should also consider such factors as the gravity of the offense under investigation, the risk that the suspect would avoid apprehension if released, the substantiality of the officers' suspicions, the degree of inconvenience caused to the suspect by the detention, the intrusion of circumstances beyond the officers' control that cause prolongation of the detention, and, of course, considerations relating to the officers' personal safety. The court of appeals failed to undertake this necessary inquiry.

B. Examination Of The Surrounding Circumstances Compels The Conclusion That Respondents Were Reasonably Detained

If the court of appeals had considered the competing factors, as required by the Fourth Amendment, it undoubtedly would have reached the conclusion that the detention of respondents was reasonable.

First, it is clear that the substantial law enforcement interest in investigating suspected drug trafficking justified the initial stop of respondents. See *United States* v. *Place*, slip op. 7-8; *United States* v. *Mendenhall*, 446 U.S. 544, 561-562 (1980) (opinion

of Powell, J.). The court of appeals did not dispute that at the time he asked Officer Thrasher to signal respondents' vehicles to stop, Agent Cooke had a reasonable suspicion that respondents were engaged in illegal activity. Cooke, an experienced narcotics agent, observed the vehicles during the early morning hours as they travelled in tandem for 21 miles in an area near the coast frequented by drug traffickers. The agent knew that pickup trucks with camper shells are often used to transport marijuana smuggled into the United States. In addition, the pickup truck appeared to be heavily loaded and the windows of the camper were covered with what appeared to be a makeshift covering in a fashion commonly used to conceal shipments of contraband. Finally, respondents' vehicles took evasive actions and began speeding after Thrasher, in his marked police car, joined Agent Cooke in following respondents. Based on these facts, Cooke acted properly in attempting to stop respondents' vehicles for the limited purpose of questioning respondents about their activities and attempting to ascertain whether the pickup was loaded with drugs.[12]

Second, it is similarly clear that the intrusion here "was reasonably related in scope to the circumstances which justified the interference in the first place" (*Terry*, 392 U.S. at 20). In particular, the 30 to 40 minute period of detention between the initial stopping of respondent Sharpe and his arrest, and, *a*

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[12] We note in addition that Officer Thrasher apparently had probable cause to arrest both respondents for speeding. Thus, there can be no question as to the propriety of the initial stop of either respondent, even if the officers were motivated in making it by their desire to investigate possible drug offenses. *Scott* v. *United States*, 436 U.S. 128, 136-137 (1978).

fortiori, the roughly 25 minutes elapsed in respondent Savage's case, was entirely reasonable under the circumstances. Agent Cooke diligently pursued his investigation, seeking assistance when necessary from other law enforcement agencies, both state and local. See pages 4-5, *supra*. Compare *Place*, slip op. 13 & n.9; *Royer*, slip op. 13-15 (plurality opinion).[13] This diligent pursuit of the investigation strongly supports a determination of reasonableness. *Place*, slip op. 13; *Summers*, 452 U.S. at 701-702 n.14.

Moreover, as Judge Russell observed in his dissent below (Pet. App. 29a-31a, 38a), the delay found excessive by the majority was no fault of the officers but was almost entirely attributable to the evasive action taken by respondent Savage, which resulted in respondents' being stopped a half-mile apart by different law enforcement officers. The fact that respondents were stopped at separate locations made

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[13] This case contrasts sharply with *Place*, in which the Court found that the agents did not exercise proper diligence in pursuing their investigation. In *Place*, the agents knew hours in advance that the defendant—a suspected drug courier—would be arriving in New York on a specific flight; they therefore "had ample time to arrange for their additional investigation at that location, and thereby could have minimized the intrusion on [the defendant's] Fourth Amendment interests" (slip op. 13; footnote omitted). Instead, because the agents waited until after Place's arrival before making the necessary arrangements for exposure of his luggage to a narcotics detection dog at a different location, the detention was unnecessarily prolonged. Similarly, in *Royer*, the plurality observed that the agents could have sought to secure Royer's consent to search his luggage on the spot, without moving him to an interrogation room (slip op. 13-14). In addition, the plurality pointed out that Royer's detention could have been minimized by exposing his luggage to a narcotics detection dog (slip op. 14-15).

it impossible for Cooke, the only DEA agent on the scene, to inspect the pickup truck, which was the focus of his suspicion, and to question its driver, respondent Savage, until police reinforcements arrived to maintain the status quo with respect to respondent Sharpe. Cooke's unsuccessful efforts to contact Officer Thrasher by radio, his wait for reinforcements, and his trip from Sharpe's Pontiac to the pickup, all necessitated by the separation, consumed most of the period—perhaps 20-25 minutes (J.A. 29). Once Cooke finally reached the pickup, less than 10 minutes elapsed before he discovered the marijuana, placed Savage under arrest, and returned to arrest Sharpe (J.A. 30, 31, 33).[14]

The court of appeals did not question the reasonableness of Agent Cook's actions upon his arrival at the pickup truck. Indeed, the evidence demonstrates that Cooke wasted no time in pursuing his investigation: Cooke examined the bill of sale that Savage had turned over to Officer Thrasher, informed Savage of his suspicion that the truck contained marijuana, and requested permission to search the truck. When Savage refused to consent, Cooke stepped on the rear bumper of the truck to confirm his suspicion that it was heavily loaded. The agent then detected the odor of marijuana emanating from the truck; he thereupon removed the keys from the ignition, opened the rear doors, and discovered a large quantity of marijuana packed in bales. Given the reasonableness of Cooke's actions at the pickup, there can be no serious question that if both respondents had

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[14] Any time elapsed while Agent Cooke returned to the location where Sharpe was waiting is irrelevant for the additional reason that probable cause to arrest him had, by that point, arisen.

pulled over at one location in compliance with Thrasher's signal, their subsequent detention would have been permissible under the Fourth Amendment.

The reasonableness of Agent Cook's actions prior to his arrival at the pickup is reinforced by consideration of the alternatives open to him once he and Officer Thrasher succeeded in stopping respondents a half-mile apart. Cooke could simply have ignored his by then substantially heightened suspicions and permitted Sharpe to go—a course of action that many reasonable people would surely view as quite irresponsible in the circumstances.[15] Or, assuming that his vehicle was equipped to transport respondent Sharpe (and his passenger) securely, and that it was prudent to leave Sharpe's Pontiac unguarded, Agent Cooke might have taken Sharpe to the location where Officer Thrasher had stopped Savage. But even if this were otherwise feasible, it would have required handcuffing Sharpe, placing him in a locked police car, and transporting him some distance—thereby elevating the intrusive character of the detention. And, although we would argue otherwise, the very

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[15] Agent Cooke had every reason to believe that Sharpe, having been alerted to the investigation into the marijuana trafficking scheme, would seek to avoid apprehension if released. Although Sharpe produced a Georgia driver's license in the name of Pavlovich, the agent was not obligated to accept this document as definitive proof of Sharpe's identity; the agent undoubtedly was aware that drug traffickers often employ false identification documents. See, *e.g.*, *Royer*, slip op. 2 (plurality opinion); *United States* v. *Mendenhall*, 446 U.S. at 548; *United States* v. *Stevie*, 578 F.2d 204, 208 (8th Cir. 1977), rev'd on other grounds, 582 F.2d 1175 (1978) (en banc), cert. denied, 443 U.S. 911 (1979); *United States* v. *Scott*, 545 F.2d 38, 39 (8th Cir. 1976), cert. denied, 429 U.S. 1066 (1977).

act of transporting Sharpe might itself support a claim that the investigative detention had become a custodial arrest. See *Royer*, slip op. 13 (plurality opinion). Plainly, the consequences of these alternatives suggest that the course adopted by Agent Cooke in pursuing his investigation was at least reasonable, if not the only one open to him under the Fourth Amendment.

In reaching a contrary result, the court of appeals mistakenly relied on *Dunaway* v. *New York*, *supra*.[16] *Dunaway* did not hold that a detention that is extended by circumstances beyond the control of the officers is unreasonable under the Fourth Amendment. In *Dunaway* police, acting on information (not amounting to probable cause) that implicated Dunaway in a murder, went looking for him and, after locating him at a neighbor's house, placed him in a police car and brought him to a police station without his consent. There, after being given *Miranda* warnings, Dunaway was interrogated in a custodial setting for a period of an hour, at which point he confessed to the crime. Although Dunaway had not been formally arrested and charged with a crime, the Court held that his detention without probable cause was unlawful because it was "in important respects indistinguishable from a traditional arrest" (442 U.S. at 212). In support of this characterization the Court noted the extended interrogation to which Dunaway was subjected, the involuntay trans-

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[16] As we have already shown (see pages 19-24, *supra*), the court of appeals also erred in relying on *Terry* and *Brignoni-Ponce* for the proposition that a more than momentary detention is unreasonable per se unless supported by probable cause.

fer to the police station, and the use of an interrogation room, as well as the fact that he was not told he was free to go and in fact would not have been allowed to depart had he attempted to do so. Here, by contrast, the detention was considerably briefer than in *Dunaway*, and its length was not attributable to the deliberate actions of the officers. Moreover, respondents were not transported to a police station, placed in an interrogation room, and subjected to extended questioning, but were questioned briefly where they were stopped. Unlike in *Dunaway*, therefore, the intrusion on respondents' Fourth Amendment interests was strictly tied to the circumstances that justified their detention in the first instance.

The holding of *Florida* v. *Royer*, *supra*, that the investigative detention there had gone beyond permissible bounds, is similarly distinguishable. The Court's decision there rests upon the use of *unnecessarily* intrusive means of investigation and conditions of restraint (see slip op. 11-12 & n.9, 13-15 (plurality opinion)) that have no analogue here. Moreover, the detention in that case lasted approximately 15 minutes—far more than the few minutes the court of appeals thought permissible here—and yet the plurality opinion did not suggest any illegality in the duration of the stop. Rather, the plurality emphasized that the "scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case," adding that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop" (slip op. 8-9). As we have explained

above, the actions of the officers in this case meet these criteria.[17]

In short, contrary to the holding of the court of appeals, the officers' actions in stopping respondents and detaining them for a limited period to pursue a legitimate investigation into suspected criminal conduct is simply an example of proper police work. The officers' "graduate[d] * * * responses to the demands of [the] particular situation" (*Place*, slip op. 13 n.10) plainly meet the Fourth Amendment's standard of reasonableness.

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[17] The court of appeals' decisions cited by the majority below (Pet. App. 21a), all of which antedate *Summers* and *Place*, also do not support the result reached here. In *United States* v. *Chamberlin*, 644 F.2d 1262 (9th Cir. 1980), cert. denied, 453 U.S. 914 (1981), the court held that the defendant's 20-minute detention was unreasonable in the absence of probable cause, specifically noting that the defendant "was not questioned briefly where he was found. He was placed in the back seat of a police car for twenty minutes." *Id.* at 1267. In *United States* v. *Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979), the defendant was removed from his car and taken to a Border Patrol office, where he was detained for three hours in an interrogation room pending the arrival of DEA agents. Finally, in *United States* v. *Miller*, 546 F.2d 251 (8th Cir. 1976), the court held that a gun discovered during a frisk of the defendant should have been suppressed because the defendant was "seized and wrongfully detained for an *unnecessarily* long period against his will" (*id.* at 253 (emphasis added)), and also because the officer did not have a sufficiently particularized suspicion that the defendant was carrying a weapon or otherwise posed a threat to the officer (*id.* at 254). While we do not necessarily agree with the results in these cases, none of them analyzes the propriety of the detention solely in terms of duration, as the court of appeals mistakenly did here.

II. THE MARIJUANA SEIZED FROM THE PICKUP TRUCK IS NOT A SUPPRESSIBLE FRUIT OF ANY ILLEGALITY TO WHICH RESPONDENT SHARPE MAY OBJECT

The question whether the sanction of exclusion should be imposed in a particular case is " 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.' " *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 7 (quoting *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 8). It is our submission that even if the court of appeals were correct in concluding that the duration of the detentions rendered the seizure of respondents unreasonable under the Fourth Amendment, it erred in holding that respondent Sharpe could obtain suppression of the marijuana discovered in the pickup truck driven by respondent Savage.[18]

As this Court has recently observed, "the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure * * *, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.' " *Segura* v. *United States*, No. 82-

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[18] In our petition for certiorari, we also argued (at 21-23) that respondent Savage could not invoke the exclusionary rule to suppress the marijuana by virtue of any illegality associated with the extended nature of his detention. We noted that the information establishing probable cause to believe that the pickup contained marijuana—*viz.*, the strong odor of marijuana emanating from the truck—was immediately discoverable, and thus, although discovery of that information was delayed, the information itself should be deemed a fruit of the lawful stop of Savage and not of any unlawful prolongation of the detention. After further consideration, we have decided not to press this argument in this brief.

5298 (July 5, 1984), slip op. 7-8 (citations omitted). At the same time, however, the Court has reiterated that evidence is to be suppressed only if it "is in some sense the product of illegal governmental activity." *United States* v. *Crews*, 445 U.S. 463, 471 (1980). See *Nix* v. *Williams*, No. 82-1651 (June 11, 1984), slip op. 11.

In this case, the discovery of the marijuana in the pickup did not result from any illegality to which respondent Sharpe may object. That conclusion is inescapable from an examination of this Court's decision in *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

In *Wong Sun* the Court held that defendant Toy's Fourth Amendment rights were violated when law enforcement agents entered Toy's home without consent or a warrant and arrested Toy without probable cause (371 U.S. at 479-484), and that Toy's incriminating statements to the officers immediately following his unlawful arrest were suppressible fruits of the agents' illegal conduct (*id.* at 484-487). The Court also held that because the statements unlawfully obtained from Toy led the officers to seize heroin from the premises of a third party, Yee, the heroin, which was come at by exploitation of the prior illegality, was also suppressible as to Toy as the fruit of the poisonous tree (*id.* at 487-488). The Court then turned to examine the admissibility of the heroin against Toy's co-defendant Wong Sun (*id.* at 491-492). It observed (*id.* at 492) that its holding that the heroin

> was inadmissible against Toy does not compel a like result with respect to Wong Sun. The exclusion of the narcotics as to Toy was required solely by their tainted relationship to informa-

> tion unlawfully obtained from Toy, and not by any official impropriety connected with their surrender by Yee. The seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial.

Here, the discovery of the marijuana did not result from the invasion of any legitimate privacy interest respondents may have had in the pickup truck. Agent Cooke's detection of the odor of marijuana emanating from the truck clearly was not a search of the truck within the meaning of the Fourth Amendment. See *Place*, slip op. 10-11. At most, the discovery of the marijuana was a product of the seizure of Savage and his truck; it plainly was not the result (under *any* standard of causation) of any official impropriety connected with the detention of Sharpe. Accordingly, the marijuana may in no event be suppressed (as to either respondent) on the basis of the somewhat greater duration of the detention of Sharpe (see also page 28 note 14, *supra*).[19] Moreover, the discovery of the marijuana following *Savage's* detention "invaded no right of privacy of person or premises which would entitle [Sharpe] to object to its use at his trial." *Wong Sun*, 371 U.S. at 492. Thus, if the Court concludes, based on the duration of Savage's detention, that Savage was un-

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[19] Indeed, the court of appeals' fruits analysis appears to focus exclusively upon the question whether the detention of Savage tainted the discovery of the marijuana (Pet. App. 22a). The court of appeals' conclusion that Sharpe's detention was unlawful may accordingly be surplusage. But it is not clear that the court of appeals' determination that the detention of Savage was unlawful was based entirely on the duration of *his* detention (see Pet. App. 20a-21a).

lawfully seized, only Savage would be entitled to suppression of the marijuana.[20]

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ELLIOTT SCHULDER
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

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[20] We note that it is not open to respondent Sharpe to contend that the government's ability to connect him to the marijuana at trial was the fruit of his unlawful detention. It is settled that a criminal defendant "cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest." *United States* v. *Crews*, 445 U.S. at 474. As the Court in *Crews* explained (*ibid.*):

> The exclusionary principle of *Wong Sun* and *Silverthorne Lumber Co.* delimits what proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness. Respondent is not himself a suppressible "fruit," and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct.

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